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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 554 23

CHARLES H. STANGE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONER.

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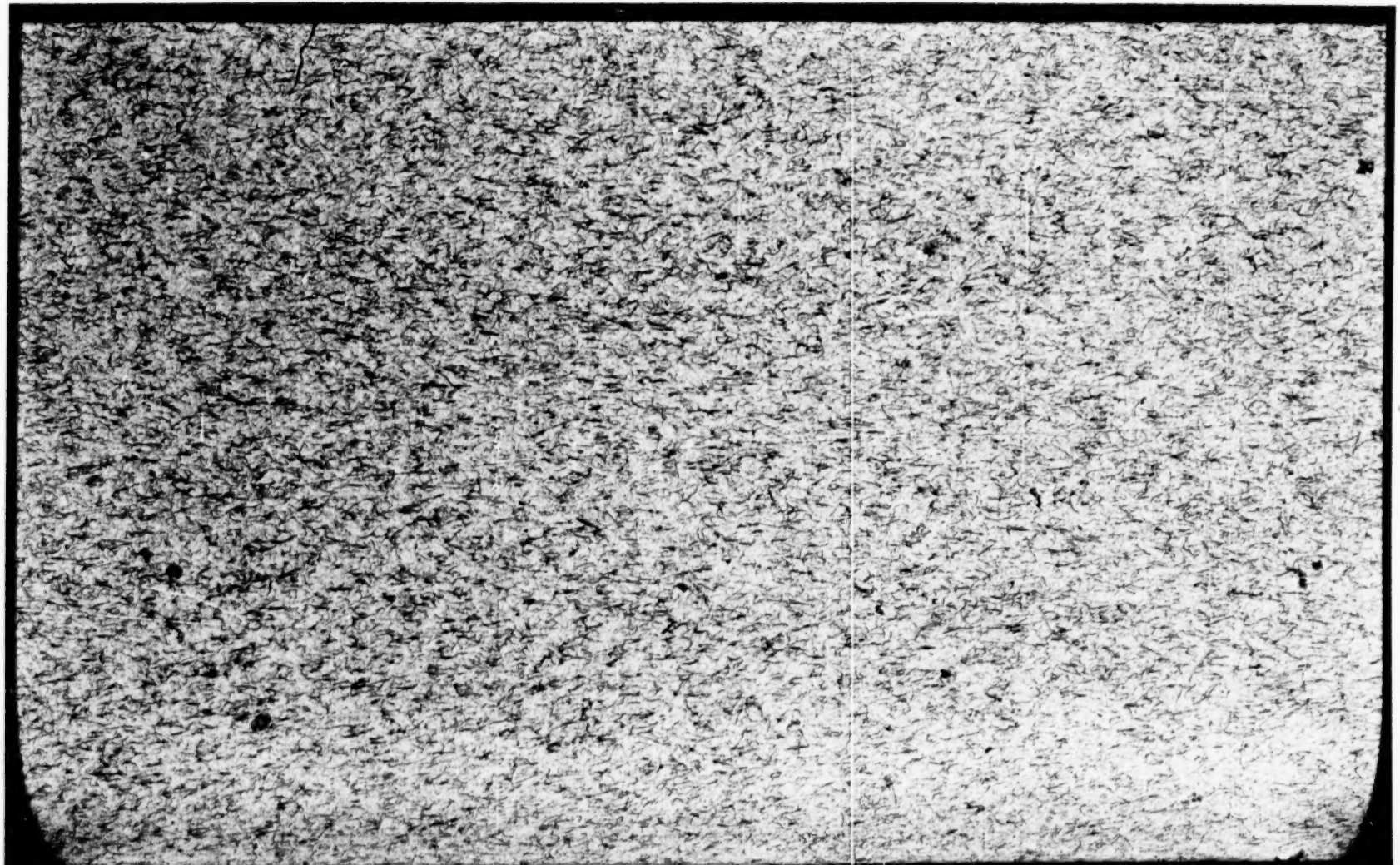

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 554

CHARLES H. STANGE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This is an appeal granted by this Court from a decision of the Court of Claims holding that plaintiff below was not entitled to recover the amount of certain income taxes, for 1914, exacted of him by the collecting officers of the United States. The plaintiff below, Charles H. Stange, will be referred to herein as "petitioner". Unless otherwise indicated, the italics of this brief are ours. Copies of the sections of the Revenue Acts involved on this appeal appear in the appendix of this brief.

Opinion of the Court Below.

The opinion of the Court below was rendered by the Court of Claims on November 4, 1929, in the action of this petitioner against the United States, No. F-261 of the records of that Court. This opinion has not yet been printed in the bound volume of the Reports of the Court of Claims. It is a part of the record on this appeal. (Rec. p. 26-35.)

Jurisdiction.

This Court has heretofore granted a writ of certiorari under Section 288 of the Judicial Code (28 U. S. C. A. 129). Subdivision (*b*) of that section is as follows:

> "In any case in the Court of Claims, including those begun under Section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

The date of the decree of the Court of Claims, sought to be reviewed, is November 4, 1929. (Rec., p. 35.) The petition for certiorari was filed on January 3, 1930. It was granted on March 3, 1930.

This is an action filed in the Court of Claims by petitioner against the United States, for the recovery

of income taxes erroneously and illegally collected from him for the calendar year 1914. (Rec., p. 7.)

Statement of the Case.

We submit as a statement of facts of the present case the findings of fact of the lower Court appearing at pages 17-26 of the record.

Specification of Errors.

The Court of Claims erred in its conclusions of law in the present case, as follows:

1. In holding that the waiver of November 14, 1922, extended the statutory period for making the additional assessment. It had no such effect because it was not a statutory waiver, *i. e.*, its provisions did not conform to Section 250(*d*) of the Revenue Act of 1921.

2. In holding that the waiver of the period of limitation for making an assessment conferred also the power to make collection at any time thereafter. In each of the Revenue Acts the two powers are separate and distinct. The waiver of the provisions of the Revenue Acts relating to the assessable period does not confer the power to collect after the expiration of the statutory period for collection.

3. In holding valid the waiver of November 14, 1922, given after the expiration of the statutory periods for assessing and collecting the additional taxes here involved. Section 250(*d*) of the Revenue Act of 1921 contemplates that waivers shall be obtained by the Com-

missioner of Internal Revenue before the expiration of the statutory periods.

These errors will be discussed in the order stated.

THE COURT OF CLAIMS ERRED:

IN HOLDING THAT THE WAIVER OF NOVEMBER 14, 1922, EXTENDED THE STATUTORY PERIOD FOR MAKING THE ADDITIONAL ASSESSMENT. IT HAD NO SUCH EFFECT BECAUSE IT WAS NOT A STATUTORY WAIVER, I. E., ITS PROVISIONS DID NOT CONFORM TO SECTION 250(*d*) OF THE REVENUE ACT OF 1921.

The income-tax return of petitioner for 1914 was filed on February 19, 1915. (Finding I, Rec., p. 17.) On November 14, 1922, petitioner signed and delivered to the Bureau of Internal Revenue a waiver reading as follows (Finding XI, Rec., p. 25):

> "C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress approved October 3, 1913, and also by the Act of Congress approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limita-

tions as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

(Signed) C. H. STANGE.

(Stamp:) Approved March 16, 1923.
(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Merrill, Wisconsin, November 10, 1922."

It will be observed that the waiver relates solely to the time within which assessments may be entered. It does not undertake to waive the limitation period for making collection.

In February, 1924, the Commissioner of Internal Revenue assessed additional income taxes for 1914 against petitioner in the amount of $28,992.55 which, together with interest in the amount of $1,787.21, petitioner paid to the collecting officer on March 19, 1925. This is the payment involved in the present case. Thereafter, and within the statutory period, refund claim was filed and rejected. (Findings XII and XIII, Rec. p. 25-26.) It should be emphasized at this point that the assessment involved in the present case was made prior to the enactment of the Revenue Act of 1924 on June 2nd of that year.

Section 250(*d*) of the Revenue Act of 1921 provides that income taxes imposed by prior revenue acts "shall

be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax * * *".

The tax in the present case was not assessed within five years after the return was filed; and the obvious answer to reliance upon the excepting clause *supra* is that neither the Commissioner nor petitioner has ever consented to a later determination, assessment, and collection of the 1914 additional tax. We suggest that under no recognized rule of statutory construction may it be said that consent to the exercise by an administrative officer of one or even two statutory powers implies consent to the exercise of an additional statutory power or powers.

The plain language of the subdivision is that the power to determine and assess must be exercised within five years after the filing of the return, unless a written consent to a later *determination, assessment, and collection* be entered into by the Commissioner and the taxpayer. In the absence of such a consent, *i. e.*, a consent containing these provisions, the limitation provided by the preceding portion of the sentence is left fully operative. Congress has prescribed the exact method by which the statutory period might be extended; and our view is that that method must be followed if the extension is to be accomplished.

The sole question that can arise in this connection, so far as we can see, is whether the provisions of the excepting clause are mandatory or merely directory. The rule on this subject is stated in Hubbert *v.* Camp-

bellsville Lumber Company, 191 U. S. 70, from which we quote:

> "Much is said in the opinion of the court of appeals as well as in the briefs of counsel as to the difference between a directory and a mandatory provision,—the plaintiff claiming that Sec. 10 is simply directory, while the defendant insists that it is mandatory. In that opinion these authorities are cited:
>
> "'By directory provisions,' says Judge Cooley, 'is meant that they are to be considered as giving directions which ought to be followed, but not so limiting the power in respect to which the directions are given that it cannot be effectually exercised without observing them.' Cooley Const. Lim. 74.
>
> "Lord Penzance, in Howard *v.* Bodington, L. R. 2 P. Div. 211, after commenting on the difficulty of gathering any rule from the cases, said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the enactment is what is called "imperative" or "directory".'"

In the cited case it appeared that an amendatory act of a State Legislature relating to the issuance of certain bonds provided that the bonds should set forth a certain stipulation, "on their face". The bonds did not contain the stipulation specified in the Act, but did

contain a reference to the original Act authorizing their issuance. The question before this Court was whether the bondholder was entitled to the benefit of the provisions of the amendatory Act. Regarding mandatory and directory provisions, the Court said:

> "Without attempting to state any general rule, if indeed one such exists, for distinguishing between a directory and a mandatory provision, it is sufficient to say that when a statute provides an extraordinary remedy to the holder of bonds containing an express stipulation that he 'shall be entitled' to that remedy, *it should not be adjudged that he is also entitled to it in the absence of such stipulation*, for it is a reasonable presumption that if the county, in issuing the bonds, intended to contract for such extraordinary remedy, it would have complied *with the express provision of the statute, and incorporated the stipulation into the bonds.*"

So, in the present case it may be said that if the Commissioner of Internal Revenue intended to make the waiver a statutory consent under Section 250(*d*) of the Revenue Act of 1921, he would have complied with the express provisions of that section and incorporated into the waiver the provisions relating to collection.

The imposition of taxes involves an exercise of the sovereign power of the Government. The property of the citizen is taken for the support of the Government, whether he be willing or unwilling. It is seldom indeed that provisions defining or limiting the power of taxing officials will be regarded as being directory, only.

The importance of the subject matter negatives any such conclusion.

The reason for the use of the conjunctive "and" and the inclusion of the word "collection" in the clause of the subdivision, "determination, assessment, and collection", is obvious. Immediately after the above-quoted provision of Section 250(*d*) follows this clause:

> "and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

The periods of limitation for making the assessment and for enforcing collection of taxes imposed by the Revenue Act of 1913 were therefore the same, viz., five years after the filing of the return. Nothing would be accomplished in aid of the revenue by the making of an assessment which could not be collected by reason of the bar of the statute. Congress did not intend that the Commissioner of Internal Revenue should do an idle thing. It, therefore, provided that no assessment should be made after five years from the filing of the return unless the Commissioner had in his possession a consent not only to a later assessment but also to a later collection of the tax.

It is, therefore, we suggest, a sufficient objection to the applicability of the waiver that it is not a *statutory* consent, *i. e.*, not such a consent as is required by Section 250(*d*) of the Revenue Act of 1921 to waive the limitation upon the power of the Commissioner to make the assessment.

THE COURT OF CLAIMS ERRED:

IN HOLDING THAT THE WAIVER OF THE PERIOD OF LIMITATION FOR MAKING AN ASSESSMENT CONFERRED ALSO THE POWER TO MAKE COLLECTION AT ANY TIME THEREAFTER. IN EACH OF THE REVENUE ACTS THE TWO POWERS ARE SEPARATE AND DISTINCT. THE WAIVER OF THE PROVISIONS OF THE REVENUE ACTS RELATING TO THE ASSESSABLE PERIOD DOES NOT CONFER THE POWER TO COLLECT AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION.

As petitioner's 1914 return was filed on February 19, 1915, the power to collect any additional taxes from him for that year expired not later than February 20, 1920. No waiver of the statutory provisions fixing the time for making collection was ever given by petitioner.

It was held, however, by the lower Court that when petitioner waived the statute limiting the time for making an assessment he thereby, and without more, waived the provisions of the statute relating to the time for

making collection. We quote from the opinion below:

> "It should be said also that the words 'assess' and 'assessment', when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term 'assess' is used at times to include all the steps involved in imposing a tax on property (Allen *v.* McKay, 120 Cal. 332), and 'to assess' often means to levy a tax (see cases cited under note 76, 5 *C. J.* 813), the two words being used with practically the same meaning, Idem, 76(*b*), and the words 'to levy' always include the collection of a tax. The same rule applies to the word 'assessment', and the parties evidently intended that the word 'assessment' should also cover the collection of the tax."

There is no evidence in this case that either party to the waiver of November 14, 1922, had any intention contrary or additional to the terms of the document itself; and in the absence of a showing of fraud or mistake, the intent is to be taken from the language of the writing. On this point we quote from *Corpus Juris*, Vol. 13, p. 524:

> "Restriction to Terms of Contract.—The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its

> meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.
>
> "COURT CANNOT MAKE NEW CONTRACT.—It is not the province of the Court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the Court cannot supply material stipulations or read into the contract words which it does not contain."

Cf. Green *v.* Biddle, 8 Wheat. 1; Calderon *v.* Atlas S. S. Co., 170 U. S. 272; Commissioner *v.* Gottlieb, 255 U. S. 310.

This rule, we suggest, applies *a fortiori* to the waiver in the present case, the form and language of which were prepared solely by the Commissioner of Internal Revenue.

Considering next the alleged merger of the two powers relating to assessment and collection, we premise, first, that the rule on this subject in each jurisdiction must be determined in the light of its own statute law; and decisions of California or other State Courts based on local statutes do not assist us in construing the Federal revenue acts, in which there is no merger of the two powers. The Federal revenue acts

here involved are those of 1918 and 1921. Section 250(*d*) of the Revenue Act of 1918 provides:

> "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made."

The Revenue Act of 1921, Section 250(*d*) contains similar provisions. We quote from that Act:

> "(*d*) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax: and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits,

> or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

It will be seen that the two periods, although they run concurrently, are separately defined by each of these Acts. The separate character of the two provisions is illustrated by the clause of the 1921 Act which allows four years for making an assessment for 1921 or any subsequent year, and at the same time allows five years for the collection of the tax liability resulting from the assessment.

The Revenue Acts of 1924 and 1926 prescribe different periods for assessment and collection. Cf. Sections 277 and 278 of each of these Acts. There is in each Act, first, the provision for the assessable period. Next, we have the provision defining the period for collection, which is six years after the making of the assessment. Thus, under the two later Acts, the two periods run consecutively rather than concurrently. In all Acts, however, a clear distinction is made by the language used between the period for assessing and the period for collecting income taxes.

It will be conceded, we assume, that an assessment made under a waiver can have no greater efficacy than an assessment made under the statute within the statutory period. Assuming its validity for the moment, we premise that the incidents of the assessment made

in the present case under the waiver of November 14, 1922, are no more and no less than the incidents of an assessment that might have been made before the end of the statutory period. In either case the material question is this: Does the power to assess or the making of the assessment, seasonably, *ex proprio vigore* extend the statutory period for collection?

This Court has always recognized and given effect to the distinction between the exercise of the two powers, *i. e.*, the power to assess and the power to collect. In the cases of New York and Albany Lighterage Company *v.* Bowers, 273 U. S. 347, and Benjamin Russell *v.* United States, 278 U. S. 181, it appeared that no complaint could be made by the taxpayer regarding the time of assessment. Nevertheless, recovery by the taxpayers in those cases was allowed by this Court because the tax had been collected after the expiration of the statutory period for collection. In the Lighterage case, the question for decision was stated by the Court to be:

> "Where under the tax laws enacted prior to the Revenue Act of 1921, income and excess profits taxes were assessed within five years after filing return, does Section 250(*d*) of that Act bar collection by distraint proceedings begun after the expiration of the five-year period?"

This question was answered by the Court in the affirmative. One of the principles necessarily established by the decision was that power to collect was not one of the incidents of an assessment seasonably

made. If, then, the incidents of an assessment made under a waiver are the same as those of an assessment made under the statute, the conclusion is inevitable that, under the principle of the Lighterage decision, the power *to collect* is not one of the incidents of the power to assess conferred by waiver.

The same principle runs through the decision of this Court in the Benjamin Russell case.

If the power to collect was properly to be merged with the power to assess, there could have been no recovery in either of the cited cases.

In the more recent case of Florsheim Bros. Dry Goods Company, Ltd., *v.* United States, decided February 24, 1930, Vol. 7 of the Advance Opinions of the Supreme Court, 1929 Term, page 300, it was contended by the taxpayer (*a*) that the power to assess was barred at the time the *assessment* was made and (*b*) that the power to collect was barred at the time *collection* was made. These two contentions are discussed separately in the opinion of this Court, different provisions of the Revenue Acts being cited in each discussion. Different reasons are given for denying each of the contentions. If the decision of the lower Court in the present case is correct, much of the discussion in the Florsheim case was unnecessary. All that this Court need to have done was to decide that the power to assess existed at the time the assessment was made.

It may not be inappropriate to state here that the reasons for the denial of the taxpayer's contentions in the Florsheim case are inapplicable to the present case. In the cited case there was a *statutory* waiver. It con-

sented to the *determination, assessment, and collection* of the tax after the expiration of the statutory periods. Moreover, the assessment in the cited case was made after the passage of the Revenue Act of 1924. Consequently, the Court held the period for collecting the assessment was to be taken from that Act. Here, the assessment was made in February, 1924, and, therefore, before the passage of the Revenue Act of 1924. Under Section 278(*c*) of that Act, the provisions of Subdivision (*d*) of the same section giving six years for collection have no application to an assessment made before the enactment of the Act. This differentiation is expressly recognized in the following excerpt from the Florsheim decision:

> "'Section 278(*d*) prescribed the period of limitation for the collection of taxes applicable to all cases enumerated in that section, and Sec. 277, which expressly included taxes under the Act of 1918. The situations intended to be excluded from the limitations prescribed were carefully specified in Sec. 278(*c*): (1) Assessments or collections already barred before the passage of that act, and (2) assessments made and proceedings begun prior to that time. Neither of the cases at bar falls within those exceptions. Since, in both cases, assessment and collection were not barred on the enactment of the 1924 Act, and were made after that date, the section is applicable. Compare Russell *v.* United States, 278 U. S. 181, 73 L. ed. 256, 49 Sup. Ct. Rep. 121.'"

By the waiver petitioner agreed to waive the statutory limitation "as to the time within which assessments based upon such liability may be entered". So much he did, and no more. The language of the waiver is quite definite and certain. It needs no construction, as the meaning of the language employed is entirely clear. Under no rule of law known to us may this writing be so enlarged as to confer the power to collect upon administrative officers after the expiration of the collection period. Certainly, no such result may be obtained in the absence of evidence clearly establishing fraud or mistake in the preparation or execution of the document. There has been no pretense that either element is to be found in the present case.

The United States Board of Tax Appeals has consistently adopted the view for which we contend. For instance, in the case of Chicago Insulated Wire & Manufacturing Company, 10 B. T. A. 1195, it appeared that the tax had been assessed under a waiver of the exact form involved in the present case. There, as here, no collection waiver was given. The Board held that collection was barred by the statute, saying:

> "The written consent entered into between petitioner and the Commissioner expired April 1, 1924. The Commissioner made the assessment on March 25, 1924, which was within the period agreed upon. The amount assessed and now claimed by the Commissioner has never been collected. Since the five-year period within which the Commissioner might collect any amount from the taxpayer as a tax expired under the statute and the consent before the

> passage of the Revenue Act of 1924, collection of the proposed deficiency is now barred by the Statute of limitations. Ocean Accident & Guarantee Corporation, Ltd., 6 B. T. A. 1045; Theodore H. Wickwire, Jr., *et al.*, Executors, 10 B. T. A. 102; Bowers *v.* New York & Albany Lighterage Co., 273 U. S. 346."

The material facts of petitioner's case are identical with those of the cited case. In that case, the Board of Tax Appeals held that the right of *collection* was barred by the statute, even though the tax was assessed within the time specified in the waiver. A contrary ruling was made in petitioner's case by the Court below.

We therefore conclude that, the two powers—the power to assess and the power to collect—being separate and distinct under the revenue acts, to confer the one power does not imply the conferring of the other. If this conclusion be sound the power to collect the taxes here involved was barred at the time collection was made. This being true, under the doctrine of the Lighterage case, 273 U. S. 347, and the Russell case, 278 U. S. 181, petitioner is entitled to recover the amount so exacted of him.

THE COURT OF CLAIMS ERRED:

IN HOLDING VALID THE WAIVER OF NOVEMBER 14, 1922, GIVEN AFTER THE EXPIRATION OF THE STATUTORY PERIODS FOR ASSESSING AND COLLECTING THE ADDITIONAL TAXES HERE INVOLVED. SECTION 250(*d*) OF

THE REVENUE ACT OF 1921 CONTEMPLATES THAT WAIVERS SHALL BE OBTAINED BY THE COMMISSIONER OF INTERNAL REVENUE BEFORE THE EXPIRATION OF THE STATUTORY PERIODS.

(*a*) The Revenue Act of 1921 was enacted on November 23, 1921. The waiver was given on November 14, 1922. The power of the Commissioner of Internal Revenue to assess or collect additional taxes for 1914, the year here involved, expired prior to the passage of that Act. Subdivision E of the Revenue Act of 1913 provides in part:

> "That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment."

Nearly seven years had elapsed from the date on which petitioner filed his 1914 return, before the Reve-

nue Act of 1921 became a law. Can it be said that that Act was intended to apply to cases in which the bar of the statute had fallen prior to its enactment?

From 37 *Corpus Juris*, 697, we take the following:

> "Extension of Statutes to Actions Already Barred.—A statute of limitations will not be construed so as to affect causes of action already barred, if such construction can reasonably be avoided, especially where the limitation in force when the cause of action accrued is a part of the right of action itself.
>
> "Revival by Statute of a Right of Action Already Barred by Limitations is an extreme exercise of legislative power which will not be deduced from words of doubtful meaning."

In Dyer *v.* Belfast, 88 Me. 140, it was said that when a remedy has been once barred by statute, a later enactment establishing a longer period of time in which the remedy may be enjoyed, will not be given a retroactive construction to revive the lost remedy unless that intention is affirmatively expressed in the act.

In Theis *v.* Beaver County, 22 Okl. 333, the Court held that a statute providing that a "set-off or counterclaim shall not be barred by the statutes of limitations until the claim of the plaintiff is so barred", did not revive a set-off barred prior to the passage of the act.

The disinclination of the Courts to give a retroactive effect to a statute which revives a power previously lost by lapse of time, is well illustrated by the case of Richards *v.* Carpenter (C. C. A. Sixth Circuit), 261 Fed. 725. Quoting from the syllabus of that case:

> "Where the three-year period in which the superintendent of banks might enforce the double liability of stockholders in a trust company, imposed by Banking Law N. Y. 1909, Sec. 196, expired prior to the amendment of April 16, 1914, to section 19, relating to the powers of the superintendent of banks, which thereafter became section 80, such amendment cannot affect the action already barred.
>
> "After right of action to enforce the double liability of stockholders in trust companies, imposed by Banking Law N. Y. 1909, Sec. 196, had been lost by the expiration of the three-year period prescribed by Code Civ. Proc. N. Y., Sec. 394, the extension of the period within which suit might be brought by subsequently enacted amendment of 1914, cannot be considered retroactive, and to revive the action."

It was argued, however, for the Government in the Court below that the intention to validate waivers given after the bar of the statute had fallen was apparent from the face of the section (Section 250(*d*) of the Revenue Act of 1921). That section, it was stated, refers to assessments to be made "under prior income * * * tax acts" or under the excise tax act of 1909. According to the contention, unless it had been intended that waivers for 1914 or earlier years should be valid, if given after the passage of the Revenue Act of 1921, the reference in the section to any act imposing taxes for years prior to 1916 would have been omitted.

The immediate question here is whether it was intended by the act that a waiver, given after November

23, 1921 (the date of its passage), should have the effect of reviving a power previously barred by the statute. In many cases, the power to assess and collect taxes for 1914 and earlier years may have been continued to and after that date (November 23, 1921) either by the filing of a common law waiver prior to the expiration of the period, *i. e.*, a waiver relating to assessment and collection, or by the failure to file a return when due. It is just as reasonable to infer that Congress intended that the section should apply to cases of that sort where the power still existed at November 23, 1921, as that it should serve to extend or permit the extension of the power after the bar had fallen.

(*b*) That doubt existed in the mind of Congress as to the validity of waivers given after the expiration of the statutory period, clearly appears in Section 506 of the Revenue Act of 1928. Subdivisions (*b*) and (*c*) of this section provide:

> "(*b*) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:
>
> "'(*f*) Any agreement which would be within the provisions of subdivision (*c*) or (*d*) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929.'
>
> "(*c*) The amendments made by this section to the Revenue Act of 1926 shall not be con-

> strued as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed."

The question of the validity of waivers given before May 29, 1928, the date of the enactment of the Revenue Act of that year, and after January 1, 1929, is thus left to the Courts for decision. The act in force when the waiver was filed in the present case is the Revenue Act of 1921; and, under Section 506 of the 1928 Act, its validity is to be determined under the 1921 Act.

In the case of Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865, the Court of Appeals of the District of Columbia had before it the question of the validity of a waiver given after the enactment of the Revenue Act of 1924. The lower Court in the present case held that there was no material difference between the provisions of the two acts (the Acts of 1921 and 1924) affecting the validity of a waiver given after the expiration of the statutory period. In the Joy Floral case, the Court of Appeals of the District of Columbia said:

> "Furthermore, section 278(*c*), *supra*, provides that the written consent for a later assessment shall not be operative, unless signed by the Commissioner as well as by the taxpayer. This provision plainly contemplates that the consent shall be executed at a time when the Commissioner still possesses the authority to make an assessment and when he may refuse to consent to any delay in making it. For it does not seem that the Commissioner's

consent would be deemed important after he has been barred by statutory limitations from making any assessment. This view is favored also by the grammatical construction of the words of sections 277 and 278, when construed together. The first section provides that the assessment shall be made within five years after the filing of the return. The second section provides that, if 'the Commissioner and the taxpayer have consented in writing' to a later assessment, the tax may be assessed at any time within the period agreed upon. The phrase 'have consented', as thus employed, fairly implies that a completed consent shall have been given before the expiration of the period first provided for. It may be added that this limitation is designed to provide for the orderly administration of the government's finances, as well as for the protection of the taxpayer. Such a purpose would not be subserved, if the Commissioner and the taxpayer could afterwards agree to the making of an assessment, utterly regardless of any time limitation."

In the later case of Florsheim Bros. Dry Goods Company *v.* United States, Vol. 7, page 300, of the Advance Opinions of the Supreme Court, 1929 Term, this Court had before it the question of the effect of a *statutory waiver* given seasonably under the Revenue Act of 1921. In the discussion of this question, the Court said:

"Stress is laid on the use of the words 'agree' and 'agreement' in the acts and regulations.

> But these are ordinary words having no technical significance. It is also urged that, unless a contract was intended, there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement. If a reason must be found, it exists in the general desirability of the requirement as an administrative matter. It serves to keep the Commissioner in closer touch with the matters which he is charged to administer. It avoids claims of improvident execution of waivers and unauthorized exactions by subordinates of the Department for the purpose of curing their own delinquencies. And it provides a formal procedure which is generally desirable for the Commissioner, collectors and subordinates in the Department. That other means might have been devised for the same purpose is of no significance."

It was thus held by this Court that the principal reason for the requirement that the Commissioner shall sign the waiver is an administrative one. To do so enables the Commissioner to keep in closer touch with the procurement of waivers by subordinates, to the end that abuses may be avoided. It is difficult to conclude that in exercising the discretion given to the Commissioner, to sign or not to sign the waiver—a discretion conferred on him for the good of the service and for the protection of improvident taxpayers—it was contemplated by Congress that the Commissioner should be called upon to decide between the revenue, on the

one hand, and considerations of orderly administration and protection of improvident taxpayers, on the other.

This consideration may be stated somewhat differently. So long as the tax is barred by limitation, it is lost to the Government. Collecting officers are properly vigilant and untiring in their efforts to collect all taxes believed by them to be due. Their attitude, when the collection of revenue is involved, is in no sense impartial in character. Are we to assume that Congress intended to leave to them a choice between correct procedure and protection of taxpayers, in the one case, and the collection of taxes, in the other?

To limit the period for assessing or collecting taxes imposes a limitation upon the power of administrative officials. They are creatures of the statute and after the expiration of the statutory period, *they have no lawful power to act.* The subject-matter here is the exercise of the sovereign power of taxation, a matter charged with a public interest. This situation is materially different from that which arises on a limitation statute that is to be waived or invoked by one citizen against another. Assuming the parties to be *sui juris*, only private rights are involved in a case of that sort and the statute or even laches may be waived at any time. There is in that case no public concern, viz., no precedent to be established which may affect other taxpayers, such as we have here where there is the question of the revival of the power of a taxing official, previously barred, to levy or collect taxes.

The Constitution confers upon Congress alone the power to lay and collect taxes. We do not contend that Congress may not extend the period for levying or collecting taxes. That question does not arise in the present case. Here, the question at issue involves the proper construction of the taxing act; and clearly the revival of a taxing power in the Commissioner of Internal Revenue, such as is here contended for by the Government, must be evidenced by language that is susceptible of no other reasonable construction. Our view is that Section 250(*d*) of the Revenue Act of 1921 does not meet that test.

In the case of the Pictorial Printing Company *v.* Commissioner of Internal Revenue, decided on February 28, 1930, not yet reported, the Circuit Court of Appeals for the Seventh Circuit had before it the identical question under discussion. The Court said:

> "But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity. The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectible. Among others of the Board's opinions there was cited in support Joy Floral Company, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective, if entered

into after the period of limitation had expired. Joy Floral Co. *v.* Commissioner, 29 F. (2d) 865. This decision was followed in Spears & Co. *v.* Heiner, Collector, D. C. Pa. 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in Columbia Iron Works *v.* Brock, Collector, September 28, 1929. But in a more recent case, in the U. S. Court of Claims, Stange *v.* United States, November 4, 1929, a decision was reached in conformity with the views of the Board of Tax Appeals in its Joy Floral Co. decision.

"For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired."

A copy of the entire opinion in the Pictorial Printing Company case is included in the appendix to this brief.

For these reasons, we respectfully request a reversal of the decision of the Court of Claims in the present case.

All of which is respectfully submitted.

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APPENDIX.

Section 250(d) of the Revenue Act of 1918.

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Section 250(d) of the Revenue Act of 1921.

(*42 Stats. 265-266.*)

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of

the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

Section 277(a)(2) and Section 278(d) and (e) of the Revenue Act of 1924.

(*43 Stats. 299-300.*)

"SEC. 277. (*a*) Except as provided in section 278 and in subdivision (*b*) of section 274 and in subdivision (*b*) of section 279—

"(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes', approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

"SEC. 278. (*d*) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after

the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"(*e*) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Section 277(a)(3) and Section 278(d) and (e) of the Revenue Act of 1926.

(*44 Stats. 58-59.*)

"SEC. 277. (*a*) Except as provided in Section 278—

"(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes', approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"SEC. 278. (*d*) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

"(*e*) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (*a*) of section 274 of this Act."

Section E of the Revenue Act of 1913.

"That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery

thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

OCTOBER TERM, 1929.

No. 4171.

PICTORIAL PRINTING COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Before Alschuler, Page, and Sparks, Circuit Judges.

OPINION OF THE COURT.

"The petition raises the question of the right of the Commissioner of Internal Revenue to redetermine in 1925 appellant's income tax for 1916, pursuant to a written consent for determination, etc., entered into after the expiration of the statutory limitation period of five years.

"The salient facts, as conceded, and as found by the Board of Tax Appeals in its findings on appeal, are:

"Taxpayer's return was filed February 28, 1917.

"August 13, 1923, while an Internal Revenue agent was at taxpayer's place of business to examine its returns for 1910 to 1919 inclusive, the agent, without referring to any limitation, informed the appellant that taxes would be assessed and payment required immediately, and that consent should be executed to provide time for an examination of returns; whereupon the agent presented, and appellant signed, an instrument of that date which provided that, pursuant to the statute, appellant and the Commissioner of Internal Revenue consent to a determination, assessment and collection of the income, etc., taxes due under any return made by taxpayer for the years 1910 to 1917 inclusive, irrespective of any period of limitations. It was signed also by the Commissioner and filed.

"It was testified that the taxpayer did not know the statutory period of limitation for 1916 had expired.

"Under date of January 26, 1924, appellee mailed appellant a so-called thirty-day letter, stating that over-assessments had been determined for the years 1910, 1911, 1912 and deficiencies found for the years 1913 and 1918 inclusive; and in this letter it was stated:

> " 'If in your opinion the additional tax indicated for the year 1918 is incorrect and you submit a protest against the action taken by this Unit, or an appeal to the Commissioner of Internal Revenue, it is necessary that you properly execute the enclosed form of waiver so that the additional tax indicated may not be placed in jeopardy.'

"This waiver or consent, dated February 2, 1924, provided for determination, etc., of income taxes from 1910 to 1918 inclusive, and stated that

> " 'This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitations as extended by any waivers already on file with the Bureau, within which assessments of taxes may be due for the year or years mentioned.'

It was signed by the taxpayer and the Commissioner, and filed February 6, 1924.

"In a letter of November 9, 1925, the Commissioner advised appellant of a deficiency in its 1916 tax of $1,615.60; and that pursuant to Section 274 of the Revenue Act of 1924 it was allowed sixty days within which to file an appeal to the United States Board of Tax Appeals. Appellant had filed no protest and made no contest as to the merits of the alleged deficiency for 1916, and there was no charge or claim that appellant's return for 1916 was false or fraudulent, or made with intent to evade taxes.

"Taxpayer then appealed, and the Board of Appeals decided against it.

"ALSCHULER, *Circuit Judge:*

"Concededly the right to take proceedings for the determination, assessment, and collection of appellant's 1916 tax terminated February 28, 1922, and when, a year and a half thereafter, the revenue officers appeared at appellant's place of business to investigate that return, there was no longer any right to institute any proceedings looking to the determination, levy, or collection of any further tax for that year.

"When the revenue officer then presented the waiver or consent for signature, the taxpayer had no liability on account of the tax for 1916; and when appellant was informed in effect that unless it was signed an emergency assessment would immediately be made and collected to protect the Government against possible deficiencies, the taxpayer, not knowing that the limitation had expired, signed it, evidently under the persuasive prospect of being required to pay at once, in advance of any investigation, whatever amount the Commissioner might demand to be paid.

"As respects the tax for 1916, with which alone we are here concerned, the parties did not deal on equal terms. The threat of immediate assessment and collection in advance of investigation, to protect the Government against a possible deficiency which at that time the Government had no right to determine, or levy, in our judgment so far partook of the nature of a duress as to render a waiver or consent so procured wholly inoperative as to that year.

"But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity. The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectible. Among others of the Board's opinions there was cited in support Joy Floral Company, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective if entered into after the period of limitation had expired. Joy Floral Co. *v.* Commissioner, 29 F. (2d) 865. This decision was

followed in Spears & Co. *v.* Heiner, Collector, D. C. Pa. 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in Columbia Iron Works *v.* Brock, Collector, September 28, 1929. But in a more recent case, in the U. S. Court of Claims, Stange *v.* United States, November 4, 1929, a decision was reached in conformity with the views of the Board of Tax Appeals in its Joy Floral Co. decision.

"For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired.

"This consent or waiver presents still another question. It was unlimited in its terms; whereas it is conceded that, under the applicable statutes, the consent should be for a limited time. The Board of Tax Appeals, in its opinion herein, concludes that such a consent is binding 'for a reasonable time', stating, 'if we had only the first waiver before us, we could not hold, on the evidence, that the time elapsed between its execution and the final determination was unreasonable.'

"If it be assumed that the Board is right in holding such unlimited waiver effective for a reasonable time, was a period of two and one-fourth years after August 13, 1923, reasonable under the record facts? At the time the taxpayer signed the consent six and one-half years had already passed since the return for 1916 was made, and at the very time of signing it revenue agents were engaged in investigating the taxpayer's books. In the Commissioner's 'thirty-day' letter of January 26, 1924, it was stated that deficiencies were found for the years 1913 to 1918, and still the letter announcing the redetermination of the 1916 tax was not sent until nearly two years thereafter. At no time

did appellant make any protest in regard to the merits of the alleged 1916 deficiency, and no controversy was pending respecting that year's tax whereby delay was occasioned. Under these circumstances, we cannot agree to the conclusion that unreasonable delay in making the determination does not appear from this record; but, on the contrary, from what is shown we conclude that the delay was decidedly unreasonable.

"As to the second consent, dated February 2, 1924, which was almost six months after the first, we deem it fair to say that even if the first consent was effective for a reasonable time, then, under the circumstances pointed out, with the revenue agents on the ground and no protest or opposition made to redetermination for 1916, a reasonable time had already expired when the second consent was given.

"But we believe the record fairly shows that the second consent, although in terms including the year 1916, did not in fact intend to include it, and ought not to be so considered. The Commissioner's letter which inclosed it stated that deficiencies had been found for the years 1913 to 1918. The 1918 taxes were not included in the first consent, which covered only the years 1910 to 1917. In the Commissioner's letter inclosing the second consent, after stating that deficiencies had been found for the years 1913 to 1918 inclusive, it was stated:

> " 'If in your opinion the additional tax indicated for the year 1918 is incorrect and you submit a protest against the action taken by this Unit, or an appeal to the Commissioner of Internal Revenue, it is necessary that you properly execute the enclosed form of waiver so that the additional tax indicated may not be placed in jeopardy.'

"This refers alone to the 1918 tax, which the prior consent did not cover, and sufficiently indicates that the purpose of this consent was to extend the time for the 1918 tax alone, leaving the others to stand upon the prior consent, which was applicable to all the years from 1910 except 1918.

"Of course, with the first consent inoperative, the second, even if held to cover the year 1916, would not justify the determination of November 9, 1925, since the second consent, by its limitation of one year, expired February 2, 1925.

"The decision of the Board of Tax Appeals is reversed and the cause is remanded with direction to sustain the taxpayer's appeal."

(3440)